

Commercial Law

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TERM OF THE WISCONSIN SUPREME COURT

(AUGUST, 1972 — AUGUST, 1973)

COMMERCIAL LAW

I. CORPORATIONS: DERIVATIVE ACTIONS

The Wisconsin Supreme Court decided two cases this term involving the law of corporations, both concerning issues of derivative shareholder actions under Wisconsin Statutes section 180.405. *Rose v. Schantz*¹ came before the court on an appeal overruling a demurrer to an amended complaint. Plaintiff sought to enjoin a scheme whereby defendant, president of U.S. Control Corporation, would deplete the corporate cash reserves, thereby rendering the corporation incapable of continuing in operation and allowing defendant to enter into a competing business. Three issues were presented: (1) whether an aggrieved shareholder must attempt to secure the desired action of the corporation prior to the commencement of suit, (2) whether an aggrieved shareholder can join a direct action on his own behalf with the derivative action, and (3) whether a corporation is a proper party to a derivative suit.

The argument on the first issue centered on whether Wisconsin Statutes section 180.405(1)(b)² requires a plaintiff in a derivative action to allege efforts to secure the actions desired by the plaintiff and either give written notice or service of a copy of the complaint on the corporation, or whether an action may be maintained by the complaint including an allegation of the reasons for not making such efforts or not giving such notice. Rejecting policy arguments by both parties, the court looked to the face of the statute, holding that it stated requirements in the alternative, so that a plaintiff need only allege that an effort was made or the reasons for not making such effort.

1. 56 Wis. 2d 222, 201 N.W.2d 593 (1973).

2. Wis. STAT. § 180.405(1)(b) provides as follows:

(1) No action may be instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares or of voting trust certificates representing shares of such corporation unless:

• • •

(b) The plaintiff alleges in the complaint with particularity his efforts to secure from the board of directors such action as he desires and alleges further that he has either informed the corporation or such board of directors in writing of the ultimate facts of each cause of action against each such defendant director or delivered to the corporation or such board of directors a true copy of the complaint which he proposes to file, and the reasons for his failure to obtain such action or the reasons for not making such effort.

This brings Wisconsin Statutes section 180.405(1)(b) in line with Federal Rule 23.1.³ Indeed, the court looked to the Federal Rules for help in interpreting this section.⁴ Rule 23.1 recognizes that in some instances, as in this case, to require a complaining shareholder to call upon the directors to undertake the action he desires would be nothing more than a meaningless bit of formality.⁵ Here, plaintiff would have been required to call upon the other two directors of the corporation to desist in their actions and to bring suit against themselves. Such request would certainly have been futile.

Presumably, the requirement of "particularity" in drafting the complaint includes "the reason for not making such effort" as it does in Federal Rule 23.1, although the decision is silent on this point. Rule Rule 23.1 will not be satisfied with a bare allegation of the futility of the demand "without allegations of fact showing how and why the demand would be futile,"⁶ and it seems reasonable that a Wisconsin court, which requires pleadings to be made

3. FED. R. CIV. P. 23.1 provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

4. The court looked to Federal Rule 23(b) which was the Federal Rule in force at the time of the adoption of § 180.405, WIS. STATS. (1971), quoting the rule at length as follows:

The complaint shall also set forth with particularity the *efforts* of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and *the reason for not making such effort*. [Emphasis supplied by the Court.]

Rule 23 was reorganized in 1966 and those portions dealing with derivative action were incorporated into the new Rule 23.1 with some additions. While the wording of the section dealt with here was changed somewhat, it is of no consequence to the question presented here.

5. 7A C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1831 (1972).

6. *Lucking v. Delane*, 117 F.2d 159, 160 (6th Cir. 1941).

with greater specificity than a Federal court, would require at least as much.

The general rule adopted in resolving the second and third issues was:

[w]here the injury to the corporation is the primary injury, and any injury to stockholders secondary, it is the derivative action alone that can be brought and maintained.⁷

The injury complained of here, the court held, was primarily and directly an injury to the corporation and not to the stockholders, a depreciation in the value of the corporation's stock notwithstanding. Mismanagement on the part of the corporate officers or majority shareholders has quite generally been held to be primarily an injury to the corporation,⁸ hence the cause of action lies exclusively in a derivative action. This logic leads inextricably to the conclusion that the corporation is not only a proper, but a necessary party to the action, and that the trial court erred in not striking the cause of action by Rose individually, as the court so held.

It might be noted, however, that it was recognized in *Marshfield Clinic v. Doege*⁹ that if the wrong complained of also violated a duty arising on a contract which is owed directly to the shareholders, an individual shareholder might maintain an action on his own behalf.¹⁰ This case was limited by its facts to a contract action, but there is no apparent reason why this principle could not be extended beyond a contract setting, as for example where the directors of a corporation held stock as collateral and conspired to depreciate the stock value so that it might then be purchased at its reduced value.¹¹ If, however, the action is not based on something more than the fiduciary duty owing stockholders by directors, it will be insufficient to maintain the individual action.¹² As a general rule, though, actions by stockholders will usually involve an injury directly to the corporation and an attorney will most often be bringing a derivative action for recovery from such injuries.

7. 56 Wis. 2d at 229, 201 N.W.2d at 598.

8. 13 W. FLETCHER, CYCLOPEDIA CORPORATIONS § 5924 (2d ed. 1970), although California has recently held *contra*. *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93, 460 P.2d 4464 (1969).

9. 269 Wis. 519, 69 N.W.2d 558 (1954).

10. *Id.* at 527, 69 N.W.2d at 562.

11. *Ritchie v. McMullen*, 79 F. 522 (6th Cir. 1897) *cert. denied* 168 U.S. 710. This and other cases illustrating this rule are collected at Annot., 167 A.L.R. 279, 287 (1947).

12. 56 Wis. at 2d 228, 229, 201 N.W.2d at 597.

*Berke v. Berke*¹³ presented a slightly different problem than *Rose*. Defendant demurred to plaintiff's complaint on the grounds that plaintiff was not a registered shareholder within the meaning of Wisconsin Statutes section 180.405(a)¹⁴ and, therefore, lacked standing to bring this derivative action. Prior to the action, but subsequent to the injuries complained of, plaintiff transferred all of his stock in the corporation to a trust for the benefit of his children, naming himself trustee. This action, defendant argued, placed plaintiff outside the statutory meaning of registered stockholder, making him ineligible to bring this action.

The court deftly pointed out the "elementary principle of law" that title to property placed in trust vests in the trustee, and when a settlor of a trust names himself as sole trustee there is no transfer of property.¹⁵ It is clear then that plaintiff was a registered stockholder at the time of the injury and continued as such following the creation of the trust. Consequently, he had standing to sue as the trial court had concluded.

II. AGENCY

Exactly when an employer is subject to liability for the acts of his employee has created problems for the courts and attorneys for a number of years. With the adoption of workmen's compensation legislation, the Wisconsin Supreme Court was obliged to develop a broader test of employers' liability for the negligent acts of their employees than was recognized under common law. In an earlier case¹⁶ the court recognized that the language of the statute which provides that for recovery an injury need only arise "out of and incidental to his employment"¹⁷ must create a broader test which extends recovery beyond the common law test of "scope of employment" if the principles inherent in workmen's compensa-

13. 56 Wis. 2d 369, 202 N.W.2d 688 (1972).

14. WIS. STAT. § 180.405(1)(a) (1971) quoted at length:

(1) No action may be instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares or of voting trust certificates representing shares of such corporation unless:

(a) The plaintiff alleges in the complaint that he was a registered shareholder or the holder of voting trust certificates at the time of the transaction or any part thereof of which he complains or that his shares or voting trust certificates thereafter devolved upon him by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of.

15. 56 Wis. 2d at 372, 202 N.W.2d at 690.

16. *Barragar v. Industrial Comm'n*, 205 Wis. 550, 238 N.W. 368 (1931).

17. WIS. STAT. § 102.03(1)(c) (1971).

tion are to be implemented. The "broader" or "arising from the employment" test, however, is limited to an employee wishing to recover for injuries sustained by himself and does not extend to a third party seeking recovery from an employer for the negligent acts of his employees.

In two recent decisions, *Wourinen v. State Farm Mutual Automobile Insurance Co.*¹⁸ and *Finsland v. Phillips Petroleum Co.*,¹⁹ the court rejected an opportunity to extend the broader test and made it quite clear that a third party seeking recovery from an employer for injuries resulting from the negligent act of his employee will be allowed such recovery only if the injury was sustained while the employee was acting within the "scope of employment," the common law or "respondeat superior" test.

In *Wourinen v. State Farm Mutual*, plaintiff sought recovery for personal injuries resulting from an automobile collision between Wesley Felice, driver and owner of the car in which plaintiff was a passenger and Walter Semenock, a member of the Wisconsin National Guard. At the time of the accident, Semenock was driving his personally owned vehicle while returning from two weeks active duty at Camp McCoy. He was on normal off-duty hours and was not required to report until the following morning at the Rhinelander armory where his unit is normally headquartered when not on active duty. If Semenock had not been traveling in his own vehicle, he would have returned by convoy with his unit the next day. The issue presented the court was whether Semenock's activities might subject the State of Wisconsin, an intervenor defendant, to liability under Wisconsin Statutes sections 21.13²⁰ and 270.58.²¹ The supreme court found that they would not, and

18. 56 Wis. 2d 44, 201 N.W.2d 521 (1972).

19. 57 Wis. 2d 267, 204 N.W.2d 201 (1973).

20. WIS. STAT. § 21.13 (1971) provides as follows:

If any member of the national guard or the state guard is prosecuted by any civil or criminal action for any act performed by such member while in the performance of his military duty and in pursuance thereof, the action against such member may, in the discretion of the governor, be defended by counsel appointed therefor by the governor upon the recommendation of the attorney general. The costs and expenses of any such defense shall be audited by the department of administration and paid out of the state treasury and charged to the special counsel appropriation in s. 20.455 and if the jury or court finds that the member of the national guard against whom the action is brought acted in good faith the judgment as to damages entered against him shall also be paid by the state.

21. WIS. STAT. § 270.58 (1971) provides as follows:

Where the defendant in any action or special proceeding is a public officer or employee and is proceeded against in his official capacity or is proceeded against as

affirmed the decision of the lower court in directing a verdict in favor of the intervening defendant.

In the second of these two decisions, *Finsland v. Phillips Petroleum Co.*, plaintiff was injured by an automobile driven by Dayle Hunter, an employee of defendant. Hunter managed a local filling station for defendant and part of his duties included forwarding a report and receipt of the previous day's business by way of a money order. Hunter, however, had detoured eight blocks from the most direct route to the place of purchase of the money order to pick up his wife, who was to accompany him downtown. The accident occurred before he picked her up. The issue presented was whether, under the facts, there were grounds upon which plaintiff might maintain a cause of action against defendant. The court held the trial court properly ruled that when Hunter had turned to pick up his wife he was not involved in a dual purpose on behalf of his employer, nor was he acting within the scope of his employment.

In arriving at their decision, the court explained that the "broader" test allows for recovery of injuries growing out of and incidental to the employment, which does not require that the employee show a causal relationship between the employment and the accident, nor that the employee's activity at the time of the injury would have benefited the employer,²² as, for example, when an employee who signed an alleged communist-backed peace petition was injured by an attack of fellow employees while performing his assigned work.²³ An earlier decision, *Butler v. Industrial Commission*,²⁴ explained that the circumstances surrounding an employment situation may be thought of as creating a "zone of special danger" and if the employee's injury arose from that zone, recovery would be allowed under the statutory language "out of

an individual because of acts committed while carrying out his duties as an officer or employee and the jury or the court finds that he acted in good faith the judgment as to damages and costs entered against the officer or employee shall be paid by the state or political subdivision of which he is an officer or employee. Regardless of the results of the litigation the governmental unit shall pay reasonable attorney's fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act in good faith, when it does not provide legal counsel to the defendant officer or employee. Deputy sheriffs in those counties where they serve not at the will of the sheriff but on civil service basis shall be covered by this subsection, except that the provision relating to payment of the judgment shall be discretionary and not mandatory. In such counties the judgment as to damages and costs may be paid by the county if approved by the county board.

22. 205 Wis. 550, 238 N.W. 368 (1931).

23. *Nash-Kelvinator v. Industrial Comm'n.*, 266 Wis. 81, 62 N.W.2d 567 (1954).

24. 265 Wis. 380, 385, 61 N.W.2d 490, 492 (1953).

and incidental to his employment.”²⁵ This was thought to allow recovery under workmen’s compensation, where a peace officer, for example, responded to an emergency outside of his jurisdiction, which he knew to be outside of his jurisdiction, and to be contrary to his employment instructions because his employment put him in a position where he would be situated to receive these calls.²⁶ Under the *Wourinen v. State Farm* rule, however, the “broader” or “arising from the employment” test will not cover third parties, who will continue to be required to come under the “scope of employment” test.

The “scope of employment” test exposes the employer to substantially less potential liability. Under this test for a plaintiff to recover from an employer for injuries resulting from the negligent use of a motor vehicle by an employee, the plaintiff must show that the employee used the vehicle with the knowledge and consent of the employer and that the vehicle was used in the scope of employment in facilitating the employer’s business.²⁷ An employee is held to be acting without the scope of his employment when his activity is different in kind from that authorized; far beyond authorized spatial or time limits; or insufficiently actuated by a purpose to serve the employer.²⁸ Recovery is also allowed if the employee has used the vehicle for a personal as well as business purpose when nothing is done which is inconsistent with the scope of employment for which the vehicle was taken and in furtherance of the employer’s business, as when a business delivery is made to the same place where personal business is to be conducted.²⁹

The key to determine scope of employment, and thus recovery against the employer, lies in the fact of the employer’s right to control.³⁰ If the employer has authorized a specific instrument or mode but has not assumed control over it, the employee will not be acting within the scope of employment.³¹ Recovery against an employer, for example, was denied a third party when an employer permitted but did not require an employee to travel to another jobsite in his own vehicle and an alternate means of transportation was available.³² Here, Semenock was returning home in his own

25. WIS. STAT. § 102.03(1)(c) (1971).

26. 265 Wis. 380, 61 N.W.2d 490 (1953).

27. *Eckel v. Richter*, 191 Wis. 409, 211 N.W. 158 (1926).

28. *Strak v. Strak*, 12 Wis. 2d 537, 541, 107 N.W.2d 632, 633, 634 (1961).

29. 191 Wis. 409, 211 N.W. 158 (1926).

30. 56 Wis. 2d at 54, 201 N.W.2d at 526.

31. *Id.* at 55, 201 N.W.2d at 527.

32. 12 Wis. 2d 537, 107 N.W.2d 632.

vehicle, the Wisconsin National Guard had no control over him, and he was on his own time. He was under no direction of his superiors and, therefore, was not deemed to have been acting within the scope of his employment.

Further, recovery will not be allowed when the employee departed from his employment duties, as Hunter did when he detoured to pick up his wife. As a general rule a slight deviation will not necessarily relieve an employer of liability from the employee's action.³³ It has been held in Wisconsin, however:

[t]he departure of the servant from the scope of his employment may *as measured in terms of time or space be very slight*, nevertheless if the act performed be one in furtherance of his own purposes and without the scope of his employment the master is not liable.³⁴ [Emphasis added.]

Yet the language of *Thomas v. Lockwood Oil Co.*, “. . . must be so substantial as to amount to a departure therefrom and for purposes entirely personal to the servant . . . ,”³⁵ was cited with approval in *Finsland v. Phillips Petroleum Co.* No reference was made to the fact situation in that case, however, where a defendant's employee detoured three blocks for the purposes of delaying his return to the employer's place of business so as to preclude his being sent on further deliveries that day and in hopes of a chance encounter with a young lady he had had recently met and whom he knew lived on one of the blocks, although he did not know her last name. An employee will also be held to be acting within his scope of employment when he abandons a departure and returns to his duties.³⁶

It is obvious, then, that the “scope of employment” test is much more restrictive than the “broader” test and the net result of *Wourinen v. State Farm Mutual Automobile Insurance Co.* and *Finsland v. Phillips Petroleum Co.* is a limitation of an employer's liability for an employee's negligent acts by refusing to extend the latter of those two tests. Although these cases state no new law, their importance is that they firmly limit, for good or bad, the employer's guarantee of protection afforded the public for the negligent acts of employees.

33. Annot., 51 A.L.R.2d 8, 58 (1957).

34. 191 Wis. at 412, 211 N.W. at 159.

35. 174 Wis. 486, 182 N.W. 841 (1921).

36. *Id.*

In *Gregory v. Sella*,³⁷ the court dealt with another aspect of agency, the real estate broker as agent. Plaintiffs, husband and wife, brought suit to recover damages resulting from defendant's refusal to tender payment for and accept the deed of plaintiffs' home pursuant to an executed offer to purchase agreement. Plaintiff, Mrs. Gregory, was at all relevant times a licensed real estate broker, but for three years prior to the transaction from which the litigation arose had not been active in this occupation. Defendant argued, by way of defense, that Mrs. Gregory, by virtue of being a licensed real estate broker, entered into a fiduciary relationship whereby she dealt with the public and which she had violated. Consequently, defendant was justified in her breach.

A previous decision, *Rusch v. Wald*, held that:

[t]he purpose and method of licensing real-estate brokers to do business and limiting this field to those so duly licensed creates a relation between the broker and the public dealing with him, which places on him an obligation commensurate with the advantage he has in the general knowledge that he is designated as one having special understanding and information concerning the things affecting his particular vocation.³⁸

The court, however, held that his case was not on point and reasoned that any fiduciary duty between a real estate broker and the public arises only when the broker assumes a role of agent, pointing out a "fundamental distinction between brokers and brokers who are agents."³⁹ Even though the real estate examining board is empowered to revoke the license of a salesman or a broker for any untruth the reliance on which causes damage to either a vendor or purchaser,⁴⁰ the court nevertheless found a fiduciary relationship arises only when the broker has begun to act on a person's behalf. Indeed, Mrs. Gregory was under no legal obligation to disclose her prior experience. The fiduciary relationship, it was found, is established when "confidence is reposed on one side and there is a resulting superiority and influence on the other,"⁴¹ and the agency for this confidential relationship will arise when there is a "manifestation of consent by one person to another that the other shall

37. 58 Wis. 2d 367, 206 N.W.2d 147 (1973).

38. 202 Wis. 462, 463, 464, 232 N.W. 875 (1930).

39. 58 Wis. 2d at 371, 206 N.W.2d at 150.

40. WIS. STAT. § 452.10(2)(a) and (b) (1971).

41. 58 Wis. 2d at 372, 206 N.W.2d at 150, citing with approval *Nolan v. Wisconsin Real Estate Broker's Board*, 3 Wis. 2d 510, 533, 89 N.W.2d 317, 330 (1958).

act on his behalf and subject to his control, and consent by the other to so act."⁴²

This may prove to be a rather unfortunate decision, in light of the fact that the court has decided, in an earlier decision, that a real estate broker is competent to handle certain arrangements for the sale of real property without the assistance of legal counsel.⁴³ While Mrs. Gregory was no longer associated with the agency involved and it was her own house being sold, the language of the decision makes no distinction between a person in Mrs. Gregory's position and a situation where an unscrupulous broker might induce an unsuspecting buyer to act in a manner adverse to his best interest which is not based on a "substantial misrepresentation" or a "false promise," where a confidence is reposed in the broker, but the broker has not consented. Such activity would be permissible under *Gregory v. Sella*, yet a violation of public interest and the *Rusch v. Wald* principles.⁴⁴

III. COMMERCIAL DEALINGS: SECURED TRANSACTIONS AND CONTRACT FORMATION

A number of issues of some importance in commercial dealings came before the court this term. The problem of the rights of a pre-paying buyer *vis-a-vis* a secured party and the question of a secured party's burden in establishing commercial reasonableness of a private sale of secured collateral were decided by the court. Also treated under the sales article of the Uniform Commercial Code were a classic case of a "battle of the forms" under section 2-207 and a problem of contract formation where terms of the agreement were left open.

42. *Id.*, n. 7, citing RESTATEMENT (Second) AGENCY, § 1.

43. *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

44. *Rush v. Wald*, 202 Wis. at 464, 232 N.W. at 875, 876, recognized that a confidential relationship need not require an assent by the real estate agent and found merely that: [i]f a broker deceives and misleads one into making a contract to the broker's or his principal's undue advantage and does so under such circumstances that trust and confidence are reposed on the one side and the influence of his recognized and licensed position and the impression of superior knowledge accompanying it are exercised on the other, the customer has a cause of action for rescission or damages, providing, of course, the customer has acted within proper limitations as to the exercise of prudence and diligence.

Such a situation had arisen earlier in *Miranovitz v. Gee*, 163 Wis. 246, 157 N.W. 790 (1916) where plaintiffs, unlettered immigrants with only a limited understanding of English, relied on misrepresentations made by defendant, a fellow countryman and friend, in the purchase of certain real property that defendant knew to be of considerably less value than what he had advised plaintiffs.

*Vic Hansen and Sons, Inc. v. Crowley*⁴⁵ follows a long line of Wisconsin decisions dealing with a secured party's duties in selling secured collateral. As early as 1905 a secured party had been held to owe a duty to obtain the best price possible on the sale of the secured property,⁴⁶ and in the recent past it was reaffirmed that a deficiency judgment will be allowed only if there has been a valid resale.⁴⁷ Most recently the Wisconsin Supreme Court indicated its great disfavor of the use of "private" sales for the disposal of the secured property by denying a deficiency judgment where each aspect of the sale cannot be shown to be commercially reasonable and by placing the burden of showing the "private" sale to be commercially reasonable upon the secured party.

In *Vic Hansen and Sons*, plaintiff, a used car dealer, attempted to recover a deficiency judgment following the private sale of an automobile, of which it held a valid secured interest, resulting from defendant's default of payment. Plaintiff purchased the vehicle from itself by crediting defendant with seven hundred dollars. This credit and the rebate of the prepaid insurance and interest were deducted from the amount still owing and plaintiff then sought a deficiency judgment on the remaining portion. The trial court denied judgment and plaintiff appealed. On appeal the court held that the plaintiff failed to establish the sale was conducted in a commercially reasonable manner and that plaintiff, therefore, failed in establishing the amount of the deficiency judgment. In reaching this decision the court outlined the framework within which commercial reasonableness is to be considered and determined with whom the burden of proof lies in establishing commercial reasonableness.

It was held that to be commercially reasonable, a disposition of the collateral of a secured transaction must be calculated to gain the best possible price. For a deficiency judgment to be granted every aspect of the sale, including the price, must be shown to be commercially reasonable. The secured creditor need not go to extraordinary means in arranging for such a sale, nor will he be bound to sell either at a retail or wholesale rate. If more can be realized by sales through retail outlets and the seller is in the business of distributing through these outlets, commercial reasona-

45. 57 Wis. 2d 106, 203 N.W.2d 728 (1973).

46. *Kellog v. Malick*, 125 Wis. 239, 103 N.W. 1116 (1905).

47. *James Talcott, Inc. v. P. & J. Contracting Co.*, 27 Wis. 2d 68, 133 N.W.2d 799 (1964).

bleness demands that the sale be made through the retail outlets.⁴⁸ The seller is also barred from making money on the sale.

After looking at a number of decisions from foreign jurisdictions,⁴⁹ the court also went on to recognize that the secured party selling secured property at a "private" sale has the burden of proving the commercial reasonableness of the sale.

A second point of defense was raised in that the purchase agreement of the vehicle was signed in blank, a violation of Wisconsin Statutes section 218.01(6)(c)⁵⁰ and there was evidence to indicate that his practice was part of plaintiff's normal routine, which prompted the court to find that such an agreement is void.

There was a number of minor points in this case that seemed to be ignored with a possible detriment to future litigation. The most apparent is the uncertainty of the "best price" language in view of the holding that "extraordinary means" are not required to attain this price. While the overall thrust of the decision is clearly to discourage private sales of secured property, there may conceivably be times when there is no recognizable market for some collateral which is to be sold, with the consequence that a secured party might be hard put to show the "best price" was obtained, even though all other elements of the sale might be shown to be commercially reasonable. This is a significant departure from the general rule that a secured party disposing of collateral need only show commercial reasonableness in the sale, albeit the decisions so holding deal with public sales.⁵¹ Indeed, the California Supreme Court has held that commercial reasonableness negates the best price duty by definition.⁵² A secured party might

48. 57 Wis. 2d at 115, 203 N.W.2d at 733, citing with approval, *Cities Service Oil Co. v. Ferris*, 9 U.C.C. Rptr. 899 (D.C. Mich. 1971).

49. *First National Bank of Bellevue v. Rose*, 188 Neb. 362, 196 N.W.2d 507 (1972); *Universal C.I.T. Credit Co. v. Rone*, 248 Ark. 665, 453 S.W.2d 37 (1970); *Fryer & Willis Drilling Co. v. Oilwell*, 472 S.W.2d 857; *Elkman v. Mountain Motors, Inc.*, 364 P.2d 998 (Wyo. 1961); *In re Bro Cliff, Inc.*, 8 U.C.C. Rptr. 1144 (D.C. Mich. 1971).

50. WIS. STAT. § 218.01(6)(c) (1971) reads as follows:

An exact copy of the installment sale contract and any note or notes given in connection therewith shall be furnished by the seller to the buyer at the time the buyer signs such contract. The buyer's copy of the contract shall contain the signature of the seller identical with the signature on the original contract. No contract shall be signed in blank except that a detailed description of the motor vehicle including the serial number or other identifying marks of the vehicle sold which are not available at the time of execution of such contract may be filled in before final delivery of the motor vehicle.

51. *But see*, Uniform Commercial Code (herein after cited U.C.C.) § 9-504, comment I; *Northern Financial Corp. v. Kosterson*, 31 Ohio App. 2d 256, 287 N.E.2d 923 (1971).

52. *Hutchinson v. Southern California First National Bank*, 27 Cal. App. 3d 526, 103

also be confronted with a situation where several commercially reasonable alternatives exist and one is later shown to have been able to generate the best price, but that alternative was not chosen. The "best price" duty also seems to be adverse to the U.C.C.⁵³

A second point that might be raised is the court's disapproval of profit being made on the sale and the approval of sale through the secured party's outlets if this will insure the best price. This forces a secured party to sell the collateral through its normal retail outlets without a profit. Presumably, the secured property is sold in place of similar property that would have been sold at a profit. The secured party thereby has been denied a profit on the sale that would have been made had he not been forced to sell the collateral in its place.⁵⁴

Nevertheless, situations where a secured party is at a loss to find a recognized market or will have retail outlets through which the sale can be accomplished are limited. It is advisable, then, to discourage a client from selling collateral by way of a private sale. If a client should insist, however, he should be informed of the great disfavor with which such sales are viewed by the court and of the burden of proof he will sustain should he be forced to justify such a sale either through challenge or to take a deficiency judgment. A secured party is probably more prudent to sell foreclosed collateral in a "recognized market," at a price "current in such market" or by means of the "reasonable commercial practices" among dealers, as the court has encouraged.⁵⁵

In *Chrysler Corp. v. Adamatic, Inc.*,⁵⁶ the issue focused on the position of a prepaying buyer. The problem arises when a creditor who holds a secured interest in a debtor's inventory attempts to foreclose on that interest and a buyer has transferred substantial amounts of money under a prepayment arrangement for goods included in the inventory. Such a situation was presented to the court for the first time in this action.

Chrysler, the buyer in this case, entered into two agreements dated a year apart for the manufacturing of certain specialized machinery by the debtor, Adamatic. The creditor, Lakeshore Commercial Finance Corporation, held a perfected security inter-

Cal. Rptr. 816 (1972).

53. U.C.C. § 9-507(2).

54. U.C.C. § 2-708(2), for example, provides that lost profits are to be included in damages resulting from breach of contract.

55. U.C.C. § 9-504(3).

56. 59 Wis. 2d 219, 208 N.W.2d 97 (1973).

est in debtor's inventory at all times material to this action. Upon completion, the machinery called for under the first agreement was sent to the buyer. No notice was ever given by the buyer of any rejection and the machine was tagged with an asset number by the buyer. The machine was returned to the debtor six months later, however, for some adjustments. In the meantime work was begun on the three machines called for under the second agreement, which were to be completed at various intervals. The agreement also called for progress payments of 80 per cent of the value of the completed work when the machines were 25 per cent completed. Debtor's financial picture, however, which had always been shaky, deteriorated rapidly and the creditor foreclosed on all of its loans outstanding, claiming a secured interest in the machines present. Buyer attempted to replevin the machines in question.

The court held that title to the machine returned to the debtor for repairs had passed to the buyer in the ordinary course of business,⁵⁷ hence the buyer was protected from the creditor's security interest.⁵⁸ It was an entirely different situation, however, with regard to the remaining incompleated machines. The issue was raised as to whether a buyer could be deemed to be a buyer in the ordinary course of business so as to cut off a creditor's rights in the secured property even though it had never taken possession of the property by delivery.

The court conceded that if the buyer was a buyer in the ordinary course of business its title could not be defeated merely because it never took possession of the secured property.⁵⁹ Under the circumstances, however, the court concluded that the buyer could not be considered a buyer in the ordinary course of business. The goods were so far short of completion as not to be identifiable to the contract nor could the buyer be said to have taken the goods by delivery when possession was established by a replevin action. The status of a buyer in the ordinary course of business, it was decided, is determined at the time a buyer actually takes possession of the goods. The court further explained that a creditor should be able to assume that all property in the possession of a person is unencumbered unless public records or personal knowledge demonstrate otherwise.⁶⁰

57. WIS. STAT. § 402.606(1).

58. 59 Wis. 2d at 235, 208 N.W.2d at 105.

59. WIS. STAT. § 409.307(1) (1971).

60. The Court relied upon a finding in a prior case, *Columbia International Corp. v. Kempler*, 46 Wis. 2d 550, 559, 175 N.W.2d 465 (1970) where it was found:

This decision clearly demonstrates the exposed position of a prepaying buyer where a creditor holds a secured interest on a debtor's inventory. The buyer had, in effect, financed the manufacturing of its machines, yet had nothing to show for the expense. The Court admitted the inequities of the situation but suggested, in light of the large size of the contract and the modesty of the debtor's assets, the buyer should have negotiated a security interest in the machines.

Two cases of some importance dealt with the sales section of the Uniform Commercial Code. *Air Products & Chemical, Inc. v. Fairbanks*⁶¹ treated the question of the "battle of the forms" under section 2-207 of the Uniform Commercial Code,⁶² which was designed to mitigate the common law rules of offer and counter-offer. Under the common law, unless an acceptance was identical to the offer, it would only be construed as a counter-offer which would be minimal in its acceptance lest the second acceptance be construed as a second counter-offer, *ad infinitum*.⁶³ Such mechanical application has no real place in contemporary commercial practice where great volumes of goods and an ever-increasing number of contracts for such shipments rely on an exchange of business forms.

people should be able to deal with a debtor upon the assumption that all property in his possession is unencumbered, unless the contrary is indicated by their own knowledge or by public records.

This rejects the argument that most financing institutions do not rely on the property in a debtor's possession when deciding whether or not to make a loan.

61. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

62. U.C.C. § 2-207 reads as follows:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

63. I R. ANDERSON, UNIFORM COMMERCIAL CODE (2d ed., 1970) (hereinafter referred to as ANDERSON) § 2-207.5, p. 343.

Air Products presented a classic "battle of the forms" fact situation to the court. A large part of this case was decided under Pennsylvania law by stipulation; consequently much of it is of little relevance to Wisconsin law. Those portions of the decision dealing with section 2-207 of the Uniform Commercial Code, however, will doubtlessly be held controlling in Wisconsin in the future.

In this action, plaintiff sued to recover for damages resulting from defendant's breach of the warranty of marketability and fitness, and defendant raised an affirmative defense to plaintiff's cause of action on the grounds it had disclaimed any warranty by terms found on the reverse side of its acknowledgment of order form. Defendant's acknowledgment of order form indicated that plaintiff's order was accepted and would be governed by the provisions found on the reverse side, the sixth of which was a disclaimer of warranties. Both parties agreed that section 2-207 was controlling, defendant contending that its acknowledgment of order became part of the contract and plaintiff arguing that since it never assented to it, the contract could not be limited by the disclaimer.

In deciding these matters the court laid down a step by step methodology to be used in determining matters under section 2-207. The first step is to determine if the parties have a deal. Here, language in defendant's acknowledgment of order evinced an intent to accept, so the deal was made. Next it is to be determined whether the acceptance is expressly conditioned on the additional or different terms. If so, it is a counter-offer. Here there was no such limitation. A legally binding agreement may be formed even with terms different or additional to the offer provided acceptance is not conditioned on the new terms. Section 2-207 will become operative only after deviant terms and an acceptance not expressly prefaced on that term has been found. Section 2-207(2) provides that unless the deviant terms materially alter the agreement or the offer expressly limits acceptance to the terms of the offer or objection is raised, they become terms of a contract between merchants. Here the latter two considerations were inapplicable and the issue to be resolved was whether the disclaimer of warranties was a material alteration of the terms agreed to, which the court found in favor of the plaintiff.

While this decision was ostensibly decided under Pennsylvania law, there is no doubt that it will be of the greatest importance in Wisconsin. The U.C.C. is, of course, national in scope and Wis-

consin Statute section 402.207(2),⁶⁴ which would not have altered this decision even in its old form, is identical to Title 12A of the Pennsylvania Statutes, section 2-207, but most important, this decision is squarely in line with what is generally held to be the best interpretation of this section.⁶⁵ By disapproving defendant's argument that it had properly disclaimed any warranties (possibly defendant argued that their acknowledgment of order constituted a counter-offer, but the decision is hazy on this point), the court rejected the rule of the much-criticized⁶⁶ case of *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*⁶⁷ By refusing to adopt plaintiff's distinction between "additional" and "different"⁶⁸ terms, the court rejected the rule of *American Parts v. Arbitration Association*,⁶⁹ thus bringing itself in line with the most accepted decisions involving section 2.207. It is difficult, therefore, to conceive of the Court reversing itself in the near future. Even though *Air Products & Chemical, Inc. v. Fairbanks* came down under Pennsylvania law, it will doubtless be of major influence in Wisconsin for a long time.

The second of the two cases dealing with contracts, *Peninsular Carpets, Inc. v. Bradley Homes, Inc.*,⁷⁰ involved an entirely different question, that of ambiguity in the formation of a contract. Ambiguity in the meaning of some word or words within a contract is the basis for numerous appeals. Most, however, add but slightly to the development of the law and are, as a result, of little interest, save for the parties involved, and are generally limited to their fact situations. The ambiguity involved in *Peninsular Carpets*, however, altered the normal pattern of facts of prior decisions. The question of ambiguity in it was not directed to the meaning of the word or words used in a contract already formed, but rather directed to the question whether the words used gave rise to the contract itself.

This case came before the court on an appeal from an order denying plaintiff's motion for summary judgment. Plaintiff alleged the formation of a contract for the purchase of certain quantities of carpeting and carpet padding between itself and defendant. De-

64. Laws of 1969, chapter 34 § 4 was amended by deleting the words "or different" after the word "additional" in WIS. STAT. 402.207(2) (1971) which brought this section into conformity with the uniform act.

65. See ANDERSON, § 2-207.

66. See, for example, ANDERSON § 2-207.5; 17 A.L.R.3d 1010, 1056, n. 10 (1968).

67. 297 F.2d 497 (1st Cir. 1962).

68. 58 Wis. 2d at 211, 206 N.W.2d at 423.

69. 8 Mich. App. 156, 154 N.W.2d 5 (1967).

70. 58 Wis. 2d 405, 206 N.W.2d 408 (1973).

fendant, by way of answer, alleged that a document presented as evidence of the alleged contract by the plaintiff was executed, but denied that such document was intended as a contract. The document, according to the defendant, was only a memorandum of terms later to be incorporated into the contract. Certain statements taken from the deposition of defendant's employee were also made part of the record. Parts of this deposition indicated an intent by the employee to bind defendant by the document submitted by plaintiff, but other portions of the document indicated that the document was thought of as only a memorandum and that the contract was expected to be forwarded at a later time. The court concluded that there was sufficient ambiguity left unsettled by the documents and affidavits submitted to warrant a denial of the motion for summary judgment and, consequently, affirmed the lower court.

In reaching this result the court reasoned that whether the question of whether the document presented by plaintiff was a contract or a memorandum is correctly a question of intent. Wisconsin Statutes section 402.204(3)⁷¹ provides that if parties to a contract intend to make a contract, the contract formed will not fail for indefiniteness even though terms may be left open and the intent of the parties is an issue of fact. Summary judgment, therefore, is inappropriate.

It is well established in Wisconsin that the construction of an ambiguous contract is a matter of law and when there is an ambiguity a determination of the meaning of a word or words used is a question of fact.⁷² The issue in this case was whether the contract had been formed. The ambiguity was in the words used in the formation of the alleged contract and, prior to *Peninsular Carpets*, there was no appropriate test. The accepted analysis of ambiguity with a contract has come to be:

[w]hen the language of a contract, considered as a whole, is reasonably or fairly susceptible to different constructions, it is therefore ambiguous, and such being the situation, the sense in which the words are therein used is a question of fact.⁷³

71. WIS. STAT. § 402.204(3) (1971) reads as follows:

Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

72. *W.P. Woodall v. Democrat Printing Co.*, 250 Wis. 348, 27 N.W.2d 437 (1947).

73. *Lemke v. Larsen Co.*, 35 Wis. 2d 427, 431, 432, 151 N.W.2d 17, 19 (1967).

This language, of course, was used to determine the meaning of words within a contract already formed. The reasoning is sound, however, and so this language has now been applied by the court to situations where a question of ambiguity arises regarding the meaning given words upon the formation of a possible contract.

C. JUDLEY WYANT

CRIMINAL LAW

I. EFFECTIVE COUNSEL

The Wisconsin Supreme Court, in the term just completed, dealt with a number of aspects concerning "effective counsel" in criminal matters. The Court prescribed the length of time a defense counsel's responsibility extends to his client;¹ ruled on the number of defendants one lawyer may represent in one case;² and, in one of the more important decisions of the term, changed the standards by which "effective counsel" is determined.³

The question of what is effective counsel has become increasingly prevalent. This area is a most difficult one because such a question can only be answered on a case by case basis: by encompassing the rights of the defendant, the facts of the case and the professional judgment and strategy of the defense counsel. The rights of the defendant are defined by both the Federal and State Constitutions, and by extensive case law. The facts of the case are presented in the trial court's record and in effect form the basis of review for the supreme court. It is the last two factors, professional judgment and strategy of the defense counsel, that present the most problems. These factors are nebulous at best and any attempt to mold them into a set formula is an extremely difficult task.

In an attempt to deal with factors of professional judgment and strategy the court held in *State v. Simmons*⁴ that an evidentiary hearing must be held whenever the competency of counsel is attacked. In the *Simmons* case the defendant was charged and found guilty of having sexual intercourse with a child. The defendant was represented by a court-appointed counsel until after conviction at

1. *Whitmore v. State*, 56 Wis. 2d 706, 203 N.W.2d 56 (1973).

2. *State ex rel White v. Gray*, 57 Wis. 2d 17, 203 N.W.2d 638 (1972).

3. *State v. Harper*, 57 Wis. 2d 543, 205 N.W.2d 1 (1973).

4. 57 Wis. 2d 285, 203 N.W.2d 887 (1973).